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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 6452 OF 2024
IN
FIRST APPEAL NO. 1288 OF 2018

Mrs. Vaishali Vijay Rasal & Ors.

...Applicants.

In the matter between:

M/s. Neumec Estate Developers L.L.P

... Appellant

Versus

Ramnath Sakharam Nikam & Ors.

...Respondents.

Mr. R.M.Haridas a/w. Mr. Tuushar Sonawane a/w. Saili Dhuru i/b. Mr. Prashant Hagare for Applicant in IA/6452/2024.

Mr. Amogh Singh a/w. Mr.Rahul Arora a/w. Akash Gupta i/b. Jeet Gandhi, for the Appellant.

Mr. P.S. Tiwari , for the Respondent No.1.

Coram : Sharmila U. Deshmukh, J.

Date : May 5, 2025.

P. C. :

1. Interim Application has been preferred seeking recall of the Order dated 6th September 2018, and the Consent Terms which was made the order of the Court, on the ground that the same is obtained by fraud. The Applicants herein are the Respondents in the First Appeal .

2. Briefly stated the facts are that in the suit filed by the present Applicants against the Appellant and other parties, the Appellant and others were perpetually restrained from dispossessing the plaintiffs

from the suit property as well as from constructing boundary wall on the suit property without following due process of law. The said Judgment was passed on 28th March 2018, and came to be challenged by the Appellant- Original Defendant No.5, in First Appeal No.1288 of 2018. During the pendency of the Appellate proceedings consent terms were tendered and by Order of 6th September 2018, this Court recorded that the parties have arrived at amicable settlement in terms of the consent terms. As entire issue revolves around the acceptance of the consent terms and the Order of 6th September 2018, it would be appropriate to reproduce the Order:

"1) The parties have arrived at amicable settlement between them. They have filed Consent Terms. The parties mainly, respondent Nos. 1 to 2 and respondent No.12, are present before the Court. They admit that they have signed the consent terms and contents therein are correct. They are identified by their learned counsel. The consent terms are taken on record and marked "X" for identification.

2) In view thereof, Appeal stands disposed off in terms of Consent Terms.

3) The decree be drawn accordingly. "

3. The consent terms were accepted by the Order dated 6th September 2018, and the Appeal came to be disposed of. Subsequently, the Applicant No.1 herein filed an application being Civil Application

St.No. 9890 of 2019 on 8th March 2019, seeking recall of the said order of 6th September 2018, and to set aside the consent terms on the ground of fraud. Subsequently, a second Application being Interim Application St. No. 14933/2022 was filed seeking the same relief to recall the order of 6th September 2018, and setting aside the consent terms. Despite both the applications, the present application came to be filed as a composite application and a statement is made in the present Interim Application that the earlier two applications would be withdrawn.

4. The application has been resisted by the original Appellant, contending that the pursuant to the consent terms, the Slum Rehabilitation Scheme has gone ahead and there is now development on the said property. It was further contended that the consent terms were executed by virtue of the power of Attorney which was executed by the Applicants in favour of the Respondent No.1 who thereafter, executed the consent terms. It was contended that the Applicants was present in Court at the time of filing of the consent terms and the presence has been recorded in the Order. It was further contended that the notice issued by the Applicant No.1 to Respondent No.1 was not to the knowledge of the Appellant and no objection was taken nor any attempt was made to the speaking to the minutes of the order, when the Applicants was present in the Court. The allegations of fraud, were

also denied.

5. Mr. Haridas, learned counsel appearing for the Applicants would submit that the Application which was initially filed by only Applicant No.1 was thereafter amended and rest of the Applicants have joined. He would submit that there is no delay in filing the present First Appeal as admittedly two applications were already filed, but were not pursued as the same was not to the satisfaction of the Applicants. He would further submit that consent terms have in fact benefited Respondent No.12 and not even the Respondent No.1, who has executed the consent terms. He would further submit that as far as the Power of Attorney is concerned the Applicant No.1 by notice dated 12th July 2018, had already informed Respondent No.1 not to take any steps towards settling the matter. He would further submit that the Respondent No.5 in the First Appeal who was the mother of the present Applicants has already expired in the year 2017 and despite thereof the order of 6th September 2018, records that the Respondent Nos.1 to 7 are present. He submits that the consent terms have not been signed by the Respondent No.1 as the Power of Attorney holder of the Respondent Nos.2 to 7 and there is no signatures of the Respondent Nos.2 to 7. He submits that it is clear that fraud has been played and the consent terms are required to be recalled. In support he relies upon the following decisions:

1) *A.V.Papayya Sastry V. Govt of A.P.*¹

2) *Ajay Ishwar Ghute Vs. Meher K.Patel*²

6. *Per contra*, Mr. Singh, learned counsel for the Appellant would submit that though the Respondent No.5-Mother had expired on 13th November 2017, no steps were taken for deleting her name during the trial Court proceedings which was decreed on 28th March 2018, and Appellant cannot be expected to be aware of the death of Respondent No.5 or that Respondent No.1 could not have executed the consent terms on behalf of Respondent No.5. He would further submit that the Power of Attorney executed by the Respondent Nos. 2 to 7 in favour of Respondent No.1, forms part of the consent terms which gave power to the Respondent Nos.2 to 7 execute any settlement on their behalf which has not been revoked. He submits it is only an Applicant No.1 who had addressed the notice to Respondent No.1 cautioning him against signing of any consent terms and not by the other Applicants. He would submit that it is only subsequent to the application being filed by Respondent No.1 and other family members had jumped in the fray and are seeking challenge the Consent Terms and there was no action taken by the other Respondents for a period of almost 7 to 8 years, after the filing of consent terms. He would further submit that

¹(2007)4 Supreme Court Cases 221

² 2024 SCC OnLine SC 681

the Respondent No.1 as the Constituted Attorney of the other Respondents have executed the consent terms which has been recorded in the order of this Court. He submits that the consent decree which has been passed is the contract between the parties, and the validity of the consent terms depends only on the validity of the agreement of compromise on which it is made drawing support from the decision of the Hon'ble Apex Court in the case of ***Pushpa Devi Bhagat Vs. Rajinder Singh***³ . He would further submit that the Hon'ble Apex Court in the case of ***Shanti Budhiya Vesta Patel Vs. Nirmala Jayprakash Tiwari***⁴ has held that after the consent decree which was passed on the basis of Power of Attorney inspite of complaints which were filed to the Delhi Police by the executant of the power of attorney as the same was not brought to the knowledge of the High Court. He submits that as the consent terms have been executed pursuant to the power of attorney, the same cannot be recalled.

7. I have considered the submissions and perused record.

8. The consent terms dated 30th August 2018, which were tendered to this Court provided that the Appellant shall allot the residential flat to the Respondent No.12 and hand over the possession to the Respondent No.12. It was further agreed that the Respondent Nos.1 to

³(2006) 5 Supreme Court Cases 566

⁴(2010) 5 Supreme Court Cases 104

7 agreed, confirmed and declared that they have no right, title or interest in the suit property and that they will withdraw all complaints and judgment and decree dated 20th March 2018, passed by the City Civil Court , Mumbai in Suit No.352 of 2020 be set aside. By the said decree the City Civil Court had restrained the Appellant and the other defendants from dispossessing the plaintiffs from the suit property.

9. By virtue of the consent terms, the present Applicants had virtually agreed to setting aside of the decree without any consideration being paid to them which creates the same doubt about the validity of the compromise. It would be pertinent to note that the order of 6th September 2018, records that the Respondent Nos.1 to 7 and Respondent No.12 are present before the Court. The order further records that they have admitted that they have signed the consent terms and contents thereof are correct. Perusal of the said order would make it evident that the Court was informed at the time of execution of the consent terms, that the Respondent Nos. 1 to 7 as well as Respondent No.12 are personally present before the Court and that they admit to have signed the consent terms. It appears that an impression was given to the Court about the presence of the Respondent No.1 to 7 and 12 and that the consent terms have been signed by them. When the order is considered in juxta position with the consent terms 30th August 2018, it is clear that the consent terms have

not been signed by the Respondent Nos.2 to 7 and has been signed only by Respondent No.1. The consent terms are not executed by the Respondent No.1 as the Power of Attorney holder of Respondent No.2 to 7 and he has merely signed as "Respondent Nos.1 to 7". The recording in the Order of 6th September 2018, that the Respondent Nos. 1 to 7 admit that they have signed consent terms could not be accepted for the reason that if they were present on 6th September 2018, they would have signed the consent terms. The impression given to the Court was that Respondent Nos.1 to 7 have admitted their signatures on the consent terms, whereas there is no signature of the Respondent Nos. 2 to 7 on the consent terms.

10. It is also an admitted position that the Respondent No.5 has expired, which would not be to the knowledge of Appellant, but evidently would be to the knowledge of Respondent No.1. It was duty of the Respondent No.1, to point out to the Court that the Respondent No.5 has expired and that the Respondent Nos.2 to 7 have not signed on the consent terms but has been signed by the Respondent No.1 as the power of attorney holder. No such submission was made to the Court and the Court relied upon the submissions made by the learned Advocates for the parties and have recorded that Respondent Nos. 1 to 7 are present before the Court and have signed the consent terms.

11. Although, the blame is sought to be placed upon the Respondent

No.1 for executing the consent terms on behalf of Respondent Nos.2 to 7, it cannot be lost sight of that the Appellant is a developer and would be better aware and better informed about the legal procedures. The consent terms were executed by the Appellant also which would indicate that the Appellant was aware that the consent terms have not been signed by the Respondent Nos.1 to 7, but by their power of attorney holder. It was the duty of the Appellant to ensure that the consent terms are properly executed and to point out to the Court that Respondent Nos. 2 to 7 have not signed consent terms but by their power of attorney holder. Even though the order was passed on 6th September 2018, the Appellant failed to move for speaking to the minutes to bring the correct position on record.

12. From the perusal of the order of 6th September 2018, it is evident that the consent terms were not signed by the Respondent Nos.2 to 7 and as the Order does not record that the consent terms have been executed by the Respondent No.1 on behalf of Respondent No.2 to 7 is their power of attorney holder. It is evident that fraud has been played not only upon the Applicants but upon this Court by representing to the Court that the Respondent Nos.2 to 7 are present before the Court and have admitted that they have signed the consent terms. It would be beneficial to refer the observation of the Apex Court in the case of **Ajay Ishwar Ghule and Others Vs. Meher K.Patel** (supra) in the context of

concept of filing the minutes of the order. The Hon'ble Apex Court has held that even if the parties file consent terms while accepting the consent terms, in terms of Rule 3 of Order XIII of the Civil Procedure Code, 1908, the Court is duty-bound to look into the legality of the compromise and that the Court has the jurisdiction to decline to pass a consent, if the same is tainted with illegality.

13. Perusal of the consent terms which were the subject matter of the present proceeding would indicate that there is no benefit to Respondent Nos.2 to 7 and they have waived their rights whether possessory or otherwise in the suit property, without any consideration.

14. Dealing with the decision relied upon by the learned counsel for the Appellant in the case of ***Shanti Budhiya Vesta Patel V. Nirmala Tiwari*** (supra) the facts thereon were that respondent No.9 for himself and for and on behalf of the appellants as their power-of-attorney holder had entered into consent terms with respondent Nos. 7 and 8 and thereby submitted to the decree of eviction. The factual scenario was completely different as in that case the execution of the consent terms was by the respondent No.9 on behalf of the others, as their power of attorney holder and in that context the Hon'ble Apex Court held that the power of attorney was not revoked and therefore would have been acted upon. In the present case, the basic law in the consent

terms is that the Respondent No.1 has not signed the same as power of attorney holder of the Respondent Nos.2 to 7 and neither the order of 6th September 2018, records that the consent terms have been executed by the Respondent No.1 as the constituted attorney of Respondent Nos.2 to 7. As such the said decision does not assist the case of the Appellant.

15. As far as delay in filing of the present application is concerned, the same has been filed in February 2024, however, prior thereto on 8th March 2019, and on 18th June 2020, two applications were filed for setting aside the consent terms. Though, there has been a delay on the part of the Applicants in moving the said two applications or even filing the said applications, considering that the fraud has been played upon this Court which is evident from the order of 6th September 2018, delay is immaterial.

16. It was submitted during the hearing that the present Applicants are not in possession of the suit property, which cannot be disputed as there is already a construction on the said property.

17. In light of the discussion above and the order of 6th September 2018, is recalled and the consent terms, if any, would bind only the Appellant and the Respondent No.1.

18. Interim Application is allowed.

19. Civil Application No.159 of 2022 and Interim Application

St.No.14933 of 2023, stand withdrawn.

20. First Appeal stand restored *qua* Respondent Nos.2 to 7.

21. To be listed on **13th June 2025**.

[Sharmila U. Deshmukh, J.]